CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION
MINUTES OF THE MEETING, Public Session

March 14, 2002

Call to order: Chairman Karen Getman called the monthly meeting of the Fair Political Practices Commission (FPPC) to order at 10:04 a.m., at 428 J Street, Eighth Floor, Sacramento, California. In addition to Chairman Getman, Commissioners Sheridan Downey, Thomas Knox, and Gordana Swanson were present.

Item #1. Approval of the Minutes of the January 15, 2002 Commission Meeting.

The minutes of the January 15, 2002 Commission meeting were distributed to the Commission and made available to the public.

Commissioner Swanson moved that the minutes be approved.

Commissioner Knox seconded the motion.

There being no objection, the motion carried.

Item #2. Public Comment.

There was no public comment at this time.

Item #29. Legislative Report

Executive Fellow Scott Burritt explained that Assemblyman Tom Harman requested Commission sponsorship of AB 1797. Under the bill, a public official who has a financial interest in a decision that will be under consideration by his or her agency will be required to (1) publicly state the specific nature of the conflict, (2) recuse himself or herself from discussing and voting on the matter, and (3) leave the room until the matter is concluded.

Mr. Burritt pointed out that public officials are already required to recuse themselves when they have a financial interest under the PRA, and that there is concern that a public official might be present at the meeting before realizing that a conflict exists, thus breaking the law under the proposal. The Commission previously required disclosure of the conflict but changed that in 2000 as part of its conflict of interest review.

The Commission in 2000 considered many factors, including concerns over how an official with a conflict would make the disclosure when absent from a public meeting or when making decisions outside the public meeting context.
Mr. Burritt stated that staff resources would be better used ensuring that public officials with a conflict do not participate in decisions rather than regulating the manner of disqualification.

Mr. Burritt pointed out that sponsorship of bills is generally limited to those proposals originating within the Commission. However, Assemblymember Harman has offered to work with the Commission on the bill.

Assemblyman Harman, who authored AB 1797, stated that he advocates mandatory disclosure. He explained that public officials sometimes do not disclose their conflict, and that he believed those conflicts should be disclosed. He gave examples of arguably inadequate disclosures, noting that public officials are often given conflicting advice from their legal counsels about what they should do when a conflict exists. He explained that the current version of the bill would not require that the official disclose his or her personal residence, and the official would not have to leave the room when the item under discussion is on the consent calendar. He believed this bill would benefit the public and those local officials who have to give advice to the public officials.

Assemblyman Harman offered to work with staff to address any concerns the Commission might have.

Commissioner Downey stated that the bill merited the Commission's attention, but that further discussion with staff would be required before the Commission considers sponsoring the bill. He urged Assemblyman Harman to work with staff.

Chairman Getman discussed the lengthy hearings on this topic in 2000, and moved that the Commission take no action to sponsor the bill at this time but continue to monitor and work with the Assemblyman's office and bring the bill back to the Commission for a fuller discussion at the April 2002 Commission meeting.

Assemblyman Harman noted that his office has worked with both CSAC and the League of Cities on this bill. Neither group had taken a position on the bill yet.

Chairman Getman amended her motion to give staff permission to work with Assemblyman Harman,the League of California Cities and CSAC on the bill.

Commissioner Downey seconded the motion.

There was no objection from the Commission.

Item #3. Proposition 34 Regulations: Adoption of Proposed Regulations 18520 and 18537.1 and Amendment of Regulations 18521, 18523, and 18523.1 regarding Sections 85200 and 85201 ("One-Bank-Account" Rule) and Section 85317 (Carry Over of Contributions.).

Assistant General Counsel John Wallace explained that § 85317 permits carryover of campaign funds without limit and without attribution of contributions to specific contributors. It differs from the transfer and attribution rule of § 85306, which is used in all other circumstances.

Mr. Wallace described option (A), noting that it would limit carry over to those funds raised in a primary election being carried over to a general election for the same office, or from a special primary to a special general election for the same office. Staff favored this narrow approach because the overall intention of Proposition 34 was to encourage transfer with attribution.

Mr. Wallace explained that option (B) was a broader interpretation of the statute and would allow carryover without attribution when a candidate is running for reelection to the same seat or when a challenger is running for the next subsequent election to the same office. Staff opposed this broad interpretation because it did not fit the overall intention of the proposition to limit contributions on a per-election basis.

Mr. Wallace presented option (C), which would allow carryover between committees established for different elections to different terms of the same office, but also included realistic limits. The limits were: (1) that the carryover would be allowed only for committees established for elections held under Proposition 34; (2) that the election for which the contributions were originally made had already been held; (3) that the committee carrying the funds forward have no net debt; and (4) that the funds being carried over not be surplus campaign funds.

In response to a question, Mr. Wallace compared options (A) and (C), noting that option (A) is very simple and would be easy to implement. Option (C) includes many limiting factors and may be a little more consistent with the language of the statute, but may be more complicated for the regulated public. Staff believed that both options would accomplish the same goal of keeping the exception narrow.

In response to a question, Mr. Wallace stated that he did not believe that option (A) would give staff more latitude, but would generate less confusion for the public.

Chairman Getman stated that option (C) did not seem complicated because the carryover provision applies only to Proposition 34 committees.

Mr. Wallace responded that the number of questions that must be asked in option (C) is greater, but that staff would be comfortable with that option.

Chairman Getman noted that option (B) was also very consistent with the statute but would allow candidates to fundraise for an old committee and use that money with no restrictions. She was not comfortable with that interpretation.

Commissioner Downey supported option (C), noting that the language of the statute may support option (B), but that he agreed with staff's concern that the exceptions be narrowed to maintain contribution limits.

Commissioner Knox expressed his concern that option (C) imported limitations on the exercise of rights under § 85317 that are not included in the statute. He questioned the basis for limiting carryover to committees without net debts.

Mr. Wallace noted that the restriction was also imposed in the federal law. That interpretation would allow committees to transfer funds that are not necessary for their election, but would not allow them to do so if they had debts. He noted that the general purpose was to move unneeded funds from a prior election, but only where debts had been paid.

In response to a question, Mr. Wallace stated that the Commission had previously discussed whether a committee's cash on hand must be used to pay net debt. He noted that there is no specific prohibition to spending money on hand when a committee has net debt.

In response to a question, Mr. Wallace stated that the proposed limitation in option (C),

§ 18537.1(b)(4), prevented "surplus funds" from being carried over, may not be necessary because the surplus funds statute is more specific and would not allow carryover of funds designated as "surplus funds." However, this section may not be necessary because the surplus funds statute is more specific and would not allow carryover of funds designated as "surplus funds." However, staff thought it appropriate to flag all restrictions that a candidate should be aware of, and Mr. Wallace suggested that the language should have been included in each of the options.

Mr. Wallace explained that officeholder campaign funds become surplus after they leave office. A challenger's funds become surplus following a "window period" after the election. If a challenger loses an election, and opens an election account for a subsequent election before funds have been designated as surplus, those funds could be carried over to a new election. Staff tried to refine the language to allow challengers to take advantage of the statute.

Chairman Getman moved that option (C) be approved without the net debt restriction.

Commissioner Downey stated that he liked the net debt restriction.

Commissioner Knox agreed, but noted that it was not part of the statute.

Commissioner Swanson agreed that the net debt limitation should not be included.

The Commission agreed to approve option (C) without subsection (b)(3).

In response to a question, Mr. Wallace stated that subsection (d) of option (C) made clear which rule would apply to a candidate who withdraws before the election. One option would allow carryover of funds after an election occurs. Another option would allow carryover when a candidate withdraws from an election. A third option prohibit the carryover of funds, but would require that the funds be transferred with attribution. The third option would discourage the creation of scam committees that could double contributions. Mr. Wallace pointed out that committees have been created without a real intention to run for an office, but rather for purposes of creating a place to keep funds so that those funds will not become surplus. He could not guess whether this sort of "manipulation" would happen again in the future.

Chairman Getman noted that those actions may not be "manipulation" if a candidate is not sure what office to run for during the next election. She noted that the candidate can carryover only when the candidate runs again for the same office.

Mr. Wallace responded that staff saw a great difference in someone who raised money for an election and never actively campaigned compared to someone who raised money and campaigned for an office.

In response to a question, Mr. Wallace stated that staff recommended that the candidate be allowed to transfer the funds with attribution, but not be allowed to carryover the funds without attribution. Those attributed funds would then count towards the contribution limits for the subsequent election.

Commissioner Swanson questioned why the Commission would facilitate carrying over of funds for a candidate who withdraws from an election.

Chairman Getman questioned whether the agency should regulate for every possible contingency that might occur, noting that the chances of candidates manipulating committees in the manner suggested by Mr. Wallace is remote and may not warrant a law.

Commissioner Downey agreed with the Chairman, and added that the statute allows carryover contributions to a subsequent election to a same elective state office. He suggested that the limitation be deleted.

Commissioner Knox agreed, noting that it can be changed if a problem emerges.

There was no objection from the Commission to Commissioner Downey's suggestion.

Mr. Wallace introduced the proposed redesignation regulations, noting that staff was presenting regulations that specifically deal with the redesignation issue, and a second set of regulations that were clarifying amendments that grew out of staff's investigation into the redesignation changes.

Mr. Wallace recommended that regulation 18520 be adopted regardless of how the Commission chose to treat the redesignation issue. The regulation would codify a requirement of § 85200 that candidates file a statement of intent to be a candidate for each specific term of office, and was a regulation that was never approved by the Office of Administrative Law (OAH). Mr. Wallace noted that there no longer appeared to be any barriers to an approval to the regulation by OAH.

Commissioner Swanson moved that the Commission adopt regulation.

Commissioner Downey seconded the motion.

Chairman Getman noted that the current version of regulation 18520 seems to remove the right to file more than one statement of intention. Even though the past version of the regulation was not approved by OAH, it did serve as a basis for advice that the FPPC has given for years.

Mr. Wallace responded that staff had not intended to change that policy. They did not believe that it needed to be in the regulation since it was understood.

There was no objection to the motion to adopt regulation 18520.

Mr. Wallace explained that proposed regulation 18521 would allow the Commission to either codify or repudiate the redesignation rule in whole or in part. He pointed out that there had been an unwritten rule that candidates can redesignate existing campaign committees.

Mr. Wallace stated that the proposed language of regulation 18521(a) simply restates the law. Subdivision (b) provides the triggering mechanism for candidates for elected state office, and subdivision (c) provides the triggering mechanism for all other elected officers. Staff believed that elections under Proposition 34 should be handled differently, and therefore recommended codifying redesignation for all candidates for office other than candidates having elections under Proposition 34. New bank accounts and new committees should be established for each election under Proposition 34's new contribution and expenditure limits.

Staff recommended that subdivision (b) be deleted from the regulation, thereby prohibiting redesignation of campaign committees for candidates for elected state office. He recommended that subdivision (c) be retained to expressly allow redesignation for local elected officers.

In response to a question, Ms. Menchaca stated that local jurisdictions with contribution limits could prohibit redesignation as long as their rule did not prevent compliance with the PRA.

Chairman Getman suggested that the regulation clarify that a local candidate can redesignate unless prohibited by local law.

Ms. Menchaca agreed.

Commissioner Knox and Commissioner Swanson agreed with staff's recommendation.

Commissioner Downey was concerned that members of the public might oppose the new regulation eliminating redesignation.

Ms. Menchaca suggested that concerns over the redesignation issue may have been eliminated when the Commission chose to accept option (C) of the carryover regulation.

There was no objection from the Commission to accepting staff's recommendation on regulation 18521.

Mr. Wallace explained that the proposed amendments to regulations 18523 and 18523.1 were clarifying changes that grew out of staff's investigation into the one-bank-account issue. He noted that regulation 18523 dealt with what a candidate with multiple committees should do upon receipt of a contribution not designated for a specific committee. Subdivisions were created in the regulation to make it easier to read and limiting language was added in subdivision (a) to ensure that a candidate could not accept a contribution in excess of the limits and divide that contribution among the candidate's various committees.

Mr. Wallace noted that staff had received some comment letters that let staff to amend regulation 18523.1. The regulation deals with what a candidate must state when soliciting contributions. Subdivision (a) of that regulation retains the existing rule for everyone except candidates for elected state office. Subdivision (b) provides different rules for those candidates.

Mr. Wallace pointed out that decision point 5 involves whether a candidate should instruct a contributor to designate a contribution. It had been longstanding advice that candidates should, but the regulated public perceived it as a technical requirement since the candidate could accept undesignated contributions. Staff and the regulated public recommended that the candidate not be required to tell the contributor to designate which committee should receive the contribution.

Commissioner Downey noted that the candidate must identify the committee for which the contribution is being solicited under subdivision (a). He agreed that the contributor should not also have to tell the contributor to make the designation.

Mr. Wallace agreed, and observed that staff was taking the opposite position by recommending that the candidate, when soliciting for a primary election, should notify the contributor. Staff believed that, since there were separate limits for the primary and general elections, it was useful for the candidate to provide that information. Additionally, it was important so that the candidate would know what the solicitation was for and it gave the contributor more information.

Chairman Getman questioned what difference it would make if the candidate was required to specify whether the solicitation was for the primary or general election, since the contributor can give one check that the candidate can designate for either election.

Mr. Wallace stated that it was important to give the contributor as much information as possible.

Commissioner Downey asked if this could create inconsistencies in what the major donor and the candidate would file on their reports.

Technical Assistance Division Chief Carla Wardlow stated that contributors are required to indicate whether their contributions are for the primary or the general election, and that it might be helpful to the contributor for purposes of reporting. She noted that there will be inconsistencies between what the candidate and the contributor report.

Chairman Getman moved that regulation 18523.1 be approved without the language in decision points 5 and 5a.

Commissioner Downey seconded the motion.

Commissioner Knox did not favor deleting the language in 5a, but did favor deleting the language in 5.

Chairman Getman stated that, if 5a is retained, it should encompass primary and general elections, as well as legal defense funds and runoffs and all other types of committees.

Mr. Wallace suggested that 5a could be eliminated and staff could revisit the issue later if necessary.

Ms. Menchaca agreed that it would be important to encompass a legal defense fund, but that the regulation was not noticed to include that issue and staff would have to bring it back to the Commission with notice if it is to be considered.

Mr. Wallace pointed out that the language in regulation 18537.1 Option C lines 7 through 9 should be deleted since the Commission had decided that redesignation should not be permitted.

Chairman Getman moved that Option C of proposed regulation 18537.1 be approved, with the deletion of subparagraphs (b)(3) and (d), and the deletion of lines 7 through 9, as well as any conforming changes staff deems necessary.

Mr. Wallace stated that staff would be happy to present those conforming changes back to the Commission for later review if the Commission wished to see them.

Commissioner Swanson seconded the motion.

Commissioners Downey, Knox, Swanson and Chairman Getman voted "aye". The motion carried by a 4-0 vote.

Commissioner Downey moved that regulation 18520 be adopted.

Commissioner Knox seconded the motion.

Commissioners Downey, Knox, Swanson and Chairman Getman voted "aye". The motion carried by a 4-0 vote.

Mr. Wallace pointed out that there were a few typographical errors in proposed regulation 18521 and that staff would correct those and present them back to the Commission later in the day.

Commissioner Swanson moved that the Commission adopt the amendments to regulation 18521, with the deletion of proposed subdivision (b) and retention of proposed subdivision (c), and adding, "unless otherwise prohibited by other local law" somewhere in lines 9, 10 or 11.

Commissioner Knox seconded the motion.

Commissioners Downey, Knox, Swanson and Chairman Getman voted "aye". The motion carried by a 4-0 vote.

Commissioner Swanson moved that the Commission adopt proposed regulation 18523.

Commissioner Downey seconded the motion.

Commissioners Downey, Knox, Swanson and Chairman Getman voted "aye". The motion carried by a 4-0 vote.

Commissioner Downey moved that the Commission adopt proposed amendments to regulation 18523.1, with the deletion of the language in decision points RE-5 and RE-5a.

Commissioner Knox seconded the motion.

Commissioners Downey, Knox, Swanson and Chairman Getman voted "aye". The motion carried by a 4-0 vote.

Chairman Getman announced that the Commission would be hearing item #24, *In The Matter of California Department of Water Resources*, after a break. She reminded those in attendance that the Commission does not allow public comment on the merits of an enforcement stipulation, under the Administrative Procedures Act, the Bagley/Keene Act and Commission policy. She noted that public comments may be made after the ruling.

The Commission adjourned for a break at 11:15 a.m.

The Commission reconvened at 11:35 a.m.

Item #24. In the Matter of the California Department of Water Resources, FPPC No. 01/335.

Chairman Getman asked Enforcement Chief Steve Russo to explain why he believed the proposed stipulation represented an appropriate resolution of the matter.

Mr. Russo explained that the case was brought against the Department of Water Resources (DWR) for failing to fulfill its duties as the filing officer for 52 consultants by failing to

determine whether the consultants had timely filed their SEI's, and for failing to notify the consultants that they had not met their filing obligations, in violation of § 81010 of the PRA.

Mr. Russo outlined the facts of the case, noting that the California Resources Energy Scheduling Division (CERS) was established within the DWR in response to an order from the Governor to secure an adequate supply of electricity. Personnel were hired and contracts were made for the purchase energy for California. Fifty-two persons were hired as consultants, and, as such, participated in making governmental decisions on behalf of DWR.

Mr. Russo discussed the three different categories of duties that the consultants performed, dealing with the purchase of energy for California. He outlined DWR's duty to have a conflict of interest code and for that code to require consultants to disclose their financial interests, noting that DWR's conflict of interest code complied with the law. DWR was the filing officer for the consultants, and, as such, was required to supply SEI forms to the consultants, to advise them if they failed to file an assuming office SEI in a 30-day period, and to advise the proper authorities if those filings were not made in a timely manner. DWR did not meet those obligations.

Mr. Russo stated that DWR hired consultants from January through June of 2001, but did not notify the consultants of their filing obligations until June 15, 2001, despite the fact that the consultants were engaged in making governmental decisions involving millions of dollars in energy contracts. DWR hired more consultants thereafter, but still delayed notifying the consultants of their filing obligations, resulting in more SEI's that were not filed within the 30-day time frame.

Mr. Russo discussed DWR's efforts since October 2001 to bring the agency into compliance with the law, and to make sure that any future hiring of consultants by that agency would result in filing obligation compliance.

Mr. Russo outlined the team effort of the Enforcement Division to investigate, evaluate evidence, and analyze the applicable law to develop an appropriate resolution to the case.

Mr. Russo stated that the stipulation only addresses the failure of the DWR to perform its filing officer duties. Staff had not addressed or resolved in the stipulation any other potential violations of the PRA that have been publicly alleged. If the Enforcement Division determined that other violations have occurred, they would be addressed in a separate action. He noted that he cannot comment on any other potential enforcement actions that might be pending.

Mr. Russo explained that enforcement actions against persons who have not filed their SEI's are usually the result of the filing officer notifying the respondent of the filing obligation and the respondent failing to meet an obligation after being notified. In this case, the consultants were not advised of their obligations by the filing officer. Staff believed that the agency that failed to meet its filing officer obligations should be held accountable. Mr. Russo outlined the legal requirements under §§ 81010 and 87500(o), noting that the agency is the filing officer, and not any one individual. He noted that § 83116.5 allowed naming as a respondent anyone who causes a violation of the Act if that person is compensated for directing the activity that is the subject of the violation in an administrative action. Staff explored that option, but found that no one outside DWR caused the failure of DWR to comply with its duty.

Mr. Russo discussed the reasons that Enforcement staff concluded that naming a particular DWR employee was unnecessary. He noted that the failure to file appeared to be the product of many

people's actions and not one particular person. He compared similar past enforcement cases against individuals in an agency, noting that they were only pursued when the acts of that individual were egregious, which was not shown to be the case in this matter. Additionally, the acts of the individuals are set forth in the exhibit, and adding their names to the stipulation would have provided no further information to the public, nor would it have had any impact on who paid the fine. Since the DWR employees were acting within the scope of their employment, under the concept of indemnification, the agency itself was liable for any fines imposed upon individuals.

Mr. Russo explained the strategies staff used to develop an appropriate fine. There were no precedents since this represents the first FPPC action against a state agency and the first action against an agency for failing to perform its duty as a filing officer. Additionally, it was the first case staff faced where the maximum penalty was $5,000 for each of the counts. He noted that the fine could have been $0 to $260,000. Staff did not believe that the maximum fine should be imposed because those fines should be reserved for deliberate or repeat violations or violations without mitigating factors. Staff considered the violations grossly negligent, but there was no evidence of any intent to fail to comply with filing officer obligations or to deceive the public. Staff did not believe that a $0 fine was appropriate because of the public harm involved and the need to send a message to the public that the violations were serious and would be treated as such. In this way, staff hoped to provide a strong deterrent to other agencies.

Mr. Russo then outlined staff's formula for the fine, noting that a matrix was designed to break down the types of violations into four different categories, and then fine amounts were assigned to those categories, with a minimum of $500 per violation because the public harm was so severe. The total recommended fine was $69,500. Staff compared this to other fines and concluded the fine was appropriate because it represented one of the highest ever imposed by this Commission. They believed that it would serve as a deterrent to keep other agencies from doing what DWR did in this case. He did not agree that the fine was a meaningless shuffle of funds. Taking money from DWR's budget and putting it back in the state general fund would embarrass the agency and have a real impact on the agency by requiring that they do more with less. The fine would not be a burden on taxpayers because it did not involve raising taxes and the money paid by DWR would revert to the General Fund for distribution to other state agencies. He did not believe that the fine was too high, but thought it was substantial and meaningful and proportionate for the violations and circumstances involved.

In response to a question from Commissioner Knox, Mr. Russo stated that this stipulation would not preclude staff from pursuing actions against individuals who may have broken the law. He clarified that the duty to file is not legally linked to the filing officer obligation to advise an individual, and would not preclude the Commission from taking action against an individual for not filing an SEI even if the agency did not comply with its filing officer obligations. He noted that nothing in the stipulation would preclude the Commission from pursuing actions charging actual conflicts of interest.

In response to a question from Commissioner Knox, Mr. Russo stated that the Commission has not taken an enforcement action against a local agency for failure to perform its filing officer duties, but noted that actions have been brought against individual filing officials for certain violations connected with the filing of SEIs. He presented four cases and outlined the nature of the violations and fines imposed for those violations. Those cases were different from the DWR stipulation because they involved individuals and not an agency.

In response to a question, Mr. Russo stated that staff considered a possible negative impact on the public by the depletion of the fine monies from the agency budget. Staff did not believe that the fine was of a sufficient amount to prevent the agency from serving the public

In response to a question, Mr. Russo stated that the rules for consultants may be different than those for other state employees. He suggested that a consultant to an agency must immediately file an SEI with the agency unless that agency determines that the consultant does not have a filing obligation. He noted, however, that the employee may not recognize that he or she is a consultant.

Chairman Getman noted that the term "consultant" is defined in the PRA, and that definition may be different from what the public might perceive as the definition.

Mr. Russo agreed, noting that it would require a legal determination by the person or by the agency to ascertain whether a person is a "consultant."

Chairman Getman pointed out that the PRA provides general guidelines in its definition of "consultant" and that each agency must make the final determination as to whether the person's duties comprise those of a "consultant." Once the person was determined to be a consultant, filing obligations would exist.

Mr. Russo noted that there is a question as to whether the agency must officially designate that the person is a consultant and must therefore file, or whether the person is considered to be a consultant with filing obligations unless the agency advises the person that he or she does not have to file.

Chairman Getman stated that the Commission may want to consider finding a way to ensure that an agency makes that determination within the 30-day window.

In response to a question, Mr. Russo explained that DWR recognized that they had a problem and have undertaken a complete review of how they determine who is or is not a consultant. They have also reviewed their system that triggers the notification of those individuals with filing obligations. They are working with the FPPC to develop a system that would work in a timely manner. DWR has indicated that they would appreciate any help in developing this system that the Commission can provide.

Commissioner Downey noted that it was not until March that DWR noticed that there might be cause for concern, and that it was not until a newspaper reporter asked about the SEI's two weeks later that the issue was really recognized. He considered that a dumbfounding laxity on the part of DWR, and noted that Director Hannigan, Deputy Director Hart and Chief Personnel Officer Rowsey had all filed their own SEIs and should have been familiar with the process. He questioned whether enforcement staff found any reason to believe that there might have been an effort to hide or shield the SEIs, rather than just gross negligence.

Mr. Russo responded that DWR was focused on creating CERS division and on trying to get in place a mechanism for buying energy and entering into energy contracts. Their Legal Division was left to determine who was a consultant, but the Legal Division was occupying itself with public records act requests and did not give a high priority to making the consultant determinations. Staff found no evidence of a deliberate attempt to deceive the public.

In response to a question, Mr. Russo stated that staff believed the fine was large enough to be meaningful to DWR.

In response to a question, Mr. Russo stated that nothing in the stipulation deals with actual conflicts of interest, and that the Commission can act if conflicts of interest are discovered.

Commissioner Downey moved that the stipulation be adopted.

Commissioner Swanson seconded the motion.

Commissioners Downey, Knox, Swanson and Chairman Getman voted "aye." The motion carried by a vote of 4-0.

William Wood, Chief Counsel to the Secretary of State (SOS) noted that the SOS requested that the FPPC investigate this case several times. The SOS believed that the settlement was premature, and that the stipulation and settlement was an inappropriate method to resolve any portion of the violations of the PRA in this matter. Mr. Wood suggested that the Commission should have conducted a full evidentiary hearing and encouraged such hearings for any further violations in this matter. Those hearings would be fully open to public comment.

Mr. Wood believed that Enforcement's justifications for finding DWR responsible relate to a local agency and are inappropriate where a state agency is involved. He did not agree that the fine was being taken from DWR, and suggested that DWR's budget has millions of dollars, and the fine was not very large by comparison.

Mr. Wood encouraged the Commission to continue a diligent investigation of all persons who may have conflicts of interest arising out of the energy crisis.

Chairman Getman stated that the Commission appreciates that the SOS brought the concerns to the FPPC's attention, but the SOS does not share with the FPPC any role in the enforcement of the PRA with respect to conflicts of interest or statements of economic interest.

Mr. Wood agreed.

The Commission adjourned to closed session at 12:30 p.m.

The Commission reconvened at 1:47 p.m.

Items #9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27 and 28.

Chairman Getman moved that the following items be approved on the consent calendar:

Item #9. ***In the Matter of Maria Moreno, Committee to Elect Maria Moreno, and Paul Berger,*** **FPPC No. 01/099.** (2 counts.)

Item #10. ***In the Matter of Chino Valley's B.E.S.T. and Rolland Bocetta,*** **FPPC No. 00/1116.** (1 count.)

Item #11. ***In the Matter of Paul Treadway and the Committee to Elect Paul A. Treadway,*** **FPPC No. 00/116.** (1 count.)

Item #12. ***In the Matter of James M. Gardiner, Committee to Elect Jim Gardiner Sheriff, and Robert E. Wacker,*** **FPPC No. 00/826.** (1 count.)

Item #13. ***In the Matter of Robert van de Hoek and Van de Hoek for Malibu Council,*** **FPPC No. 01/098.** (1 count.)

Item #14. ***In the Matter of Xochilt Ruvalcaba, Friends of Xochilt Ruvalcaba for South Gate City Council, and Maria Ruvalcaba,*** **FPPC No. 99/231.** (3 counts.)

Item #15. ***In the Matter of Eveline Ross and Friends of Eveline Ross,*** **FPPC No. 01/272.** (2 counts.)

Item #16. ***In the Matter of Cindy Montanez, Cindy Montanez for City Council '99, and Steven Veres,*** **FPPC No. 00/388.** (1 count.)

Item #17. ***In the Matter of West Kern Machinery,*** **FPPC No. 00/420.** (1 count.)

Item #18. ***In the Matter of Long Beach Lesbian & Gay Pride, Inc.,*** **FPPC No. 01/251.** (1 count.)

Item #19. ***In the Matter of United Association Political Action Fund and Martin J. Maddaloni, Treasurer,*** **FPPC No. 01/244.** (2 counts.)

Item #20. Failure to Timely File Late Contribution Reports – Proactive Program.

- **a.** ***In the Matter of David Shimmon,*** **FPPC No. 2002-94.** (1 count.)
- **b.** ***In the Matter of Fran Pavley for Assembly,*** **FPPC No. 2001-696.** (1 count.)
- **c.** ***In the Matter of Henry & Susan Samueli,*** **FPPC No. 2001-690.** (1 count.)
- **d.** ***In the Matter of IBM Corporation,*** **FPPC No. 2002-25.** (1 count.)
- **e.** ***In the Matter of Lou Correa for State Assembly,*** **FPPC No. 2001-697.** (2 counts.)
- **f.** ***In the Matter of Pacific Telesis Group (and its subsidiaries, affiliates of SBC Communications, Inc.),*** **FPPC No. 2002-7.** (1 count.)
- **g.** ***In the Matter of Parsons, Brinckerhoff, Quade & Douglas, Inc.,*** **FPPC No. 2001-698.** (2 counts.)
- **h.** ***In the Matter of Re-Elect Assemblywoman Carole Migden,*** **FPPC No. 2001-705.** (8 counts.)
- **i.** ***In the Matter of Roz McGrath for Assembly,*** **FPPC No. 2001-701.** (1 count.)
- **j.** ***In the Matter of Wilma Chan for Assembly,*** **FPPC No. 2001-689.** (1 count.)
- **k.** ***In the Matter of Yes on Prop 35 - Taxpayers for Fair Competition,*** **FPPC No. 2001-695.** (1 count.)

21. Failure to Timely File Late Contribution Reports – Non-Proactive Cases

- **a.** *In* ***the Matter of Reed & Davidson, LLP,*** **FPPC No. 00/464.** (1 count.)
- **b.** ***In the Matter of Democratic Senatorial Campaign Committee,*** **FPPC No. 2001-398.** (1 count.)

22. ***In the Matter of Alfred Landers, Committee to Elect Al Landers, Friends of Al Landers, and Al Landers Mayor 99,*** **FPPC No. 98/134.** (6 counts.)

23. ***In the Matter of Deborah Orlik,*** **FPPC No. 99/052.** (1 count.)

25. ***In the Matter of Chong Ha,*** **FPPC No. 97/336.** (2 counts.)

26. ***In the Matter of Bernard (Bud) Kroll and J.P. Morgan Investment Management Inc.,*** **FPPC No. 01/463.** (2 counts.)

27. ***In the Matter of Megan Chernin,*** **FPPC No. 00/607.** (2 counts.)

28. ***In the Matter of Pam Garcia,*** **FPPC No. 99/540.** (2 counts.)

Commissioner Knox seconded the motion.

Commissioners Downey, Knox, Swanson and Chairman Getman voted "aye." The motion carried by a vote of 4-0.

Item #5. Proposition 34 Regulations: Adoption of Proposed Emergency Regulation 18572, Lobbyist Prohibition on Contributions.

Commission Counsel Scott Tocher briefly outlined decisions made at the September 2002 Commission meeting with regard to this regulation. He reported that, pursuant to the Commission's direction, staff had conducted an Interested Persons meeting. He noted that a court decision had come down since the September meeting upholding the constitutionality of § 85002. Staff drafted language for the proposed regulation that considered both the court decision and the interested person's input.

Mr. Tocher discussed the structure of the regulation, noting that it prohibited lobbyists from making contributions to elected state officials or candidates for elective state office whom the lobbyist is registered to lobby. The Commission decided in September that the ban should apply to a lobbyist's personal funds, and the question before the Commission was whether the ban should apply to other than purely personal funds belonging to the lobbyist.

Mr. Tocher discussed the issues presented in the regulation, noting that subdivision (a) of the proposed regulation reflects the Commission's decision to apply the prohibition to a lobbyist's use of personal funds, using § 82015 and Commission regulations for the definition of "making a contribution." He stated that Decision 1 addressed defining a lobbyist's personal funds and explained its proposed provisions. Staff recommended adoption of subdivision (a), including the language of Decision 1.

Chairman Getman stated that the arguments posed by Mr. Hiltachk's comment letter seemed persuasive, and queried whether Mr. Hiltachk's proposed regulation language might be both a simple and correct alternate.

General Counsel Luisa Menchaca noted that Mr. Hiltachk's proposal omits language that outlines how the contribution was made, which she believed would be helpful to the public.

In response to a question, Ms. Menchaca agreed that there are general rules about how a contribution is made.

Ms. Menchaca stated that staff's proposal includes, "personal funds or assets" and Mr. Hiltachk's proposal includes "personal funds or resources." She noted that "assets" is also used in regulation 18611 relating to lobbyist reporting and more closely ties into regulations and rules that are already in effect.

Ms. Menchaca was most concerned about Mr. Hiltachk's proposed subsection (b) because it focuses on accepting a contribution instead of the lobbyist making a contribution. Regulation 18421.1 requires a different standard for receiving a contribution than that proposed by Mr. Hiltachk. She noted that the statute applies to contributions to a candidate seeking office and an elected state officer whom the lobbyist is registered to lobby and that the two do not mean the same thing. That could be problematic, and she reiterated that staff did not believe that the issue of accepting contributions should be addressed.

Ms. Menchaca stated that, if the Commission liked Mr. Hiltachk's proposed subdivision (c), staff believed that the language in subdivision (c)(1), "possessed by a lobbyist" should be deleted so that staff would not have to determine what that means.

Chairman Getman noted that staff objected to Mr. Hiltachk's proposal defining "accepting a contribution," because general rules that apply, yet staff proposed defining "making a contribution," and there are general rules apply for that too. She suggested that "contributions from a lobbyist," are the only things needing definition, and noted that the two proposals were very similar on that subject.

Ms. Menchaca agreed with regard to the scope of the regulation. She recommended that, if the Commission chose to consider Mr. Hiltachk's language, subdivision (b) should be deleted or staff should be given an opportunity to address "making" or "acceptance" issues to ensure that it does not impact how "accepts" works with Proposition 34 in general.

Chairman Getman observed that, if the contribution is considered to be from the lobbyist if it is from the lobbyist's personal funds or assets, then the Commission needs to decide whether the affiliation issues need to be addressed.

Mr. Tocher agreed, and discussed the possible affiliation issues in subdivision (c) of Mr. Hiltachk's proposal.

Commissioner Downey compared the two drafts, observing that there seemed to be no objection to using § 18533 to protect spouses of the lobbyists. He presented a hypothetical example with regard to Decision Point 2, questioning whether a contribution made by a business that is wholly owned by a lobbyist, but run by the lobbyist's son or daughter, would be considered a contribution by the lobbyist.

Mr. Tocher believed that the contribution would be considered to be from the lobbyist. He stated that if the same lobbyist gave a small percentage of the business away, and the business made a contribution, it would not be a prohibited contribution if subdivision (c) is not considered.

Commissioner Downey agreed, noting that it seemed to fit with the language of the statute.

In response to a question, Mr. Tocher stated that subdivision (b)(2) of staff's proposal was in agreement with Mr. Hiltachk's proposal. Mr. Tocher characterized subdivision (b)(3) of staff's proposal as informative as opposed to substantive, and Mr. Tocher agreed that it could be deleted without substantive impact.

In response to a question, Mr. Tocher stated that subdivision (b)(3) required that a person making a contribution on behalf of a lobbyist would have to disclose the lobbyist as an actual contributor, and noted that § 84302 required the actual contributor be identified.

Commissioner Swanson stated that staff's report was thorough and that Mr. Hiltachk's information was very useful, but she suggested that the Commission should consider staff's proposal.

Chairman Getman noted that they were comparing the proposals to determine the differences, which did not appear to be great.

Commissioner Swanson explained her concern that the regulation reflect the intent of the voters, noting that she believed that the voters wanted to curtail the influence of money by lobbyists, regardless of whose account the money comes from.

Mr. Tocher responded that the two versions were very similar, but that the main decision was whether the affiliated entities rule is applied with respect to § 85702.

Chairman Getman summarized that the Commission was in agreement that personal funds and assets of a lobbyist cannot be used to make contributions, and that the Commission needed to decide what to do when the contributions do not clearly belong to the lobbyist. She observed that staff believed that the affiliated entities rule should be used with respect to funds over which there is direction and control by the lobbyist.

Mr. Tocher stated that § 85702 provided authority to use the affiliated entities rule.

Chairman Getman noted that Mr. Hiltachk would not agree that the rule applied.

Commissioner Downey noted that § 85311 reads, "For purposes of the contribution limits of this chapter…" He observed that the issue involved the chapter but that a complete ban on any kind of contribution did not involve contribution limits.

Mr. Tocher responded that when §§ 85311 and 85702 were adopted by the voters, the limiting language of § 85311 applied it to the whole chapter, including the lobbyist provision. When the legislature amended it for purposes of the contribution limits, the question remained whether it was intended to take the lobbyist portion out of the scope of § 85311. The SB 34 bill analysis was silent on this point. Mr. Tocher had heard an informal suggestion that the purpose of the amendment was to limit § 85311 to determining compliance with the contribution limits, rather than applying it to the whole chapter, including the reporting rules. If the purpose of the amendment was to change the limitation of the lobbyist prohibition, it may not further the purposes of the PRA because it would narrow the scope. He detailed the considerations involved.

Commissioner Downey noted that there were constitutional concerns if the Commission should decide to expand the provisions of § 85702 to include affiliated entities. He believed that the Commission should avoid proposed subdivision (c) because there was minimal statutory authority and because of historic concerns involved in the issue.

Mr. Tocher noted that staff had no formal recommendation. He noted that the question of defining a ban or a limit has generated much debate.

Chairman Getman noted that an FPPC advice letter involving the personal funds of a candidate, under Proposition 34, indicated that a candidate could donate unlimited personal funds. The letter also indicated that, if a candidate wholly owned an entity and the entity was under the direction and control of the candidate, the funds of that entity are not considered personal funds belonging to the candidate for purposes of donating unlimited personal funds. It appeared that the regulation under discussion would count those monies, making the regulations inconsistent.

Mr. Tocher observed that Mr. Hiltachk's proposal defined "personal funds," and that the language would conflict with the advice letter. Staff's proposed language reads, "In addition to a lobbyist's personal funds, a lobbyist is deemed to make a contribution when…."

Ms. Menchaca noted that Mr. Hiltachk's proposal is better in that respect. The staff proposal is an extension of the affiliation concept. By using Mr. Hiltachk's proposed language, the affiliation issues could be avoided.

Chairman Getman agreed, noting that both proposals would require that a lobbyist's business contributions would count as a contribution from personal funds only when the lobbyist wholly owned the business. If two lobbyists own a business, and both lobby the legislature, the business could contribute funds to the legislator because neither lobbyist wholly owned the business.

Mr. Tocher noted that the ban would not apply to contributions to political parties, and that issues involving business ownership could become complex. He believed that the "wholly owned" language was clear even though it might be subject to gamesmanship.

Commissioner Knox observed that it could be unfair, because a lobbyist who is a sole practitioner would be precluded from providing funds from the lobbyist's firm, while lobbyists engaging in exactly the same trade with anything less than 100% interest in the same business may contribute funds.

In response to a question, Mr. Tocher stated that the Commission had decided during an earlier discussion not to totally ban contributions from lobbying firms because the terms "lobbyist" and "lobbying firm" were defined terms in the Act. He noted that an advice letter addressed that issue.

Chairman Getman observed that staff's proposed ban on contributions by a committee comprised solely of lobbyists does not consider who those lobbyists are registered to lobby.

Commissioner Knox observed that Mr. Hiltachk's proposal tracks the funds and not the committee.

Chairman Getman noted that his proposal does not consider who the lobbyists are.

Ms. Menchaca suggested that both proposals should read, "from lobbyists subject to the prohibition of § 85702." The prohibition would apply based on who the lobbyist is registered to lobby.

Chairman Getman noted that the lobbyist's committee and/or business is not registered to lobby anyone, causing her to question whether subdivisions (a) and (b) can or may be done.

Mr. Tocher responded that the language of § 85702 and consideration of past court cases would allow the Commission to include subdivisions (b)(1) and (b)(2). He could not guess whether the proposals would result in gamesmanship or unfair treatment of a wholly owned lobbying firm. He believed that subdivision (b)(3) could be left out without changing the substance of existing law.

Commissioner Downy summarized that the Commission was considering including in the definition of "personal funds or assets" the assets of a wholly owned business, providing the lobbyist directs the making of contributions from that business.

In response to a question, Chairman Getman agreed that she questioned whether the Commission had statutory authority to include "wholly owned" businesses but not include businesses that are wholly owned by two or more lobbyists.

Ms. Menchaca pointed out that this provision would provide a limitation, because it would allow staff to determine whether the partial ownership was a personal asset of the lobbyist. She clarified that the proposal would provide that a wholly owned entity would be included in the ban, but any ownership of less than 100% would not be included in the ban. If left undefined, regulation 18611 would apply but provides unclear guidance.

Chairman Getman stated that the lines were irrational. She suggested that the Commission could ban the lobbyist's personal funds, as provided in the statute.

Mr. Tocher pointed out that the statute does not use the term "personal funds". The Commission established that term as a "floor" in an earlier decision. He explained that it is the primary difference between the two regulatory approaches. One approach limits the ban to personal funds and resources, but conflicts with an advice letter. The other approach would include personal funds, some circumstances involving property and other circumstances possibly involving business entities. He clarified that the latter approach would not apply to an affiliated entity. Subdivision (b) of staff's proposal and subdivision (c) of Mr. Hiltachk's proposal do not address affiliated entities

Commissioner Swanson suggested that the ban be limited to a lobbyist's personal funds. She noted that the Commission could revisit the other issues.

Commissioner Downey summarized that "personal funds" would include monies in a personal checking account, but questioned whether it should also include the monies in a business wholly owned by a lobbyist, or include the monies of the corporation that may be used for tax purposes to run the business.

Chairman Getman stated that she was uncomfortable including all of the business entity monies for a lobbyist because those funds would not be considered "personal funds" for a candidate.

Mr. Tocher stated that the staff proposal allows the Commission to make the distinction between personal funds or other funds. He noted that it did not address the potential conflict with contributing personal funds to a candidate's own campaign.

Chairman Getman asked staff whether they were comfortable with language providing that personal funds would only refer to those funds in a bank account.

Mr. Tocher responded that it seems to be the minimum that has been agreed upon. He pointed out that, when using that approach, the issue of financial interest in a business entity does not have to be addressed.

Commissioner Downey pointed out that § 85702 would not allow a contribution of stocks, and that "personal funds" seems to indicate money or assets.

Commissioner Swanson noted that "personal funds" could be those included on an IRS report.

Ms. Menchaca suggested that the Commission may wish to expand the language in the regulation to include contributions of another person when the lobbyist has a financial interest or is a member of a committee. If the Commission chooses not to do that, then the Commission would reject proposed subdivisions (b) and (c).

Chairman Getman noted that combining two entities for purposes of contribution limits or reporting requires applying the affiliated entities rule. In this case, staff is proposing that it would not be considered, and that there would be a different rule set up just for this statute.

Mr. Tocher suggested that the Act already singles out lobbyists by creating the prohibition, and therefore does intend a different treatment for contributions from lobbyists.

Chairman Getman asked if staff was suggesting that the affiliated entities rule would not apply because lobbyists are different and will be treated differently, and that nothing with respect to lobbyists has any bearing on any other interpretation of the Act.

Ms. Menchaca stated that the current proposed language in subdivision (c) could be replaced with language specifically designating whether § 85311 applies in this situation.

Mr. Tocher stated that if § 85702 provided authority for treating the lobbyists differently, the Commission would still need to determine what it means to make a contribution.

In response to a question, Mr. Tocher stated that he thought there was authority under § 85311(d) and § 85702 to ban contributions from lobbying firms. The recent decision at the district court considered evidence as to how the statute was applied with regard to telephone advice, but did not reach the question of a lobbying firm. He discussed the details of the case, noting that it resulted in a conservatively broad application of the statute and still did not pose a first amendment problem.

Chairman Getman noted that the District Court did not address the affiliated entities rule.

Commissioner Knox noted that a lobbyist is allowed to advise others on how to contribute. He asked whether the lobbyist could do that when the lobbyist has a majority interest in the entity the lobbyist advises.

Mr. Tocher responded that the court did not squarely address that circumstance, and that staff believed that a ban prohibiting lobbyists from advising clients would not be upheld, but did not know what the courts would do with affiliated entity issues.

Chairman Getman noted that all of the situations concerned the lobbyists making decisions about someone else's money. The affiliated entities' rule deals with determining when the money is considered to be the lobbyist's money.

Mr. Tocher noted that there may be cases where the lobbyist does not have a financial interest in an entity, but may control the monies of that entity.

Chairman Getman noted that it is reported as if it is the lobbyist's money and that the contribution limit treats it as if it is the lobbyist's money.

Mr. Tocher stated that the entity would report it as its money even though it is directed and controlled by the individual.

Ms. Wardlow stated that they can be required to file a combined report.

Thomas Hiltachk, on behalf of the Institute of Governmental Advocates, urged the Commission to consider the history of Proposition 34 for the answer. He explained that Proposition 208 banned contributions from, through or arranged by a lobbyist. He believed that the voters intended to change the law and did not want to ban contributions "arranged by" or "through" a lobbyist. Rather, the voters only wanted to ban contributions "from" a lobbyist, and the voters should have known that "from" a lobbyist means the personal funds or resources of a lobbyist and did not include contributions arranged by or through a lobbyist.

Mr. Hiltachk stated that subdivision (b) of his proposal was included to ensure that the ban applied to lobbyists making contributions and candidates accepting contributions. This would help the lobbying community know that the ban is a two-way street. He stated that Proposition 34 permits candidates to give funds to their own campaign committee, and that the definition that existed for the lobbyist ban included "funds or resources." His proposal defined "funds or resources." He agreed that the resources of a sole proprietor lobbying firm should be considered the resources of the "lobbyist," but did not believe that the affiliation statute should be extended to include § 85702 because the statute was adopted with former regulation 18626 in mind. Mr. Hiltachk discussed the language of former regulation 18626, and encouraged the Commission to adopt the defined term, that he believed the voters knew, of former regulation 18626.

Chairman Getman responded that § 85311 did not indicate that the ban should not apply.

Mr. Hiltachk responded that the sole purpose of § 85311 was to determine whether a person (which includes an individual and an entity) should be considered to be affiliated. It did not address when two individuals should be considered affiliated. Lobbyists are defined as individuals. He noted that it would have been easy for the authors of Proposition 34 to include the terms "lobbyists and lobbying firms" or "lobbyists and entities affiliated with the lobbyists" in the ban. He noted that the ban repeatedly has been found unconstitutional. Defined terms were used because of the First Amendment.

Chairman Getman noted that the statutory language "funds or resources" could mean the current standard, under which, if a person is affiliated with an entity, then the entity's resources are deemed to be those of the person.

Mr. Hiltachk responded that the standard of § 85311 has never been interpreted to mean that one individual shall be affiliated with another individual.

Chairman Getman noted that she was referring to entities. A lobbyist cannot make a contribution from his or her personal resources. In order to define a lobbyist's funds or resources, § 85311 must be considered.

Mr. Hiltachk disagreed, noting that a person often directs and controls the contributions of an entity and those resources do not belong to that person.

Commissioner Knox pointed out that § 85311(d) draws a bright line definition at a 50% ownership interest. The problem is whether § 85311 applies at all with regard to whether there is a difference between limits as described in § 85311 and the outright ban.

Mr. Hiltachk agreed, noting that it is the overriding problem. Secondarily, he believed that the notion of direction and control was rejected by the voters when they adopted Proposition 34.

Commissioner Knox noted that the voters adopted § 85702 and left § 85311 in the Act. Therefore the affiliated entity statute is still a consideration.

Mr. Tocher noted that adoption of § 85311 should by no means be considered a rejection of the notions of direction and control because in adopting the language of § 85311 the voters said it applied for purposes of the chapter.

Mr. Hiltachk disagreed because a limitation is not a prohibition. If the voters wanted that section to apply, the words were available to the authors to include it. He did not believe that the Commission had the authority to impose them.

Chairman Getman questioned which standard applied: whether the language would have been used if they wanted that section to apply, or whether the language would have been used if they did not want that section to apply.

Mr. Hiltachk responded that it worked both ways. Section 85311 applied to limits and this issue did not involve a limit. Secondarily, § 85311 applied when identifying persons and § 85702 identified lobbyists, who are defined as individuals, not persons.

Commissioner Knox noted that when the voters banned contributions by lobbyists it was likely they intended to have the ban apply to lobbying firms. He favored adhering to the language of the statute, but thought that the voter's intent was readily apparent.

Mr. Hiltachk stated that Commissioner Knox's analysis can only be used if there is an ambiguity and there was no ambiguity in the word "lobbyist."

Commissioner Knox argued that there was ambiguity about whether § 85311 incorporates a lobbying firm, allowing affiliation of the lobbying firm's contribution with the lobbyist that owns 50% of the firm. The word "limits" may be ambiguous.

Mr. Hiltachk responded that the ambiguity argument cannot be made if the historical reference is not considered. However, the elimination of the notion of "arranging" eliminated the ambiguity.

Trudy Schafer, representing the League of Women Voters of California, expressed her concern that the Commission not lose sight of the intent of the voters. She noted that the November 2001 ballot pamphlet arguments stated that Proposition 34 banned "any" contributions by lobbyists to any elected state officer that the lobbyist lobbies, and that lobbyists would be forbidden from making contributions. Ms. Schafer was concerned that the discussion was leaning towards a settlement of less than what the law allows the Commission to do.

Ms. Shafer stated that settling for a ban on only the personal funds of a lobbyist would clearly not be what the voters expected. Additionally, banning contributions from only those entities that are wholly owned by a lobbyist would be settling for less than the Commission should.

Ms. Shafer pointed out that Proposition 208 did have the words, "from," " through," and "arranged by," but those words were included with respect to what contributions the candidate or committee could accept, and those words were no longer in the language. Proposition 34, however, also involves contributions a lobbyist can make, and the plain meaning of "make" includes using contributions from a lobbying firm that a lobbyist partially owns. She suggested

that the public would have expected the ban if an entity is under the direction and control of lobbyists.

In response to a question, Chairman Getman stated that she earlier had referred to the *Mitchell* advice letter of January 18, 2002, regarding a candidate's unlimited contribution of personal funds.

Ms. Shafer pointed out that this issue involves the corruption or the appearance of corruption that is balanced with the first amendment rights of the lobbyist. The very important state interest of removing the corruption or the appearance of corruption makes the two issues different.

Tony Miller, representing himself, believed that the Commission was not boxed in to the definitions because Proposition 34 enacted a new approach. Proposition 208 dealt with receiving contributions from a lobbyist and Proposition 34 deals with making contributions as well as receiving contributions. He believed that the Commission can disregard the old language with respect to "from," "through," and "arranging," terms developed for Proposition 208. The Commission should consider the plain meaning of the word "make," and that should include personal funds, funds of a sole proprietorship, and funds directed and controlled by the lobbyist. He believed the voters obviously intended to sever the link to the extent constitutionally possible between lobbying and campaign fundraising. He did not know whether § 85311 needed to be imported. Rather, the language should simply include funds under the direction and control of the lobbyist.

Mr. Hiltachk responded that "direction and control" should apply to the contribution, not the funds of the entity. He presented an example of a lobbyist who is an elected treasurer of a democratic central committee and signs the checks for that entity. He questioned whether, since the lobbyist signs the checks, the central committee would not be allowed to participate in campaigns.

Chairman Getman responded that the lobbyist would not be directing and controlling under the affiliation statute, because the lobbyist simply writes the check and the democratic committee makes the decisions.

Mr. Hiltachk stated he did not necessarily agree and questioned whether the resolution should relate "to the wallet of the lobbyist." If so, these types of problems will occur.

Mr. Hiltachk stated that his memo addressed entities wholly owned by lobbyists. With regard to PACs, he did not believe that the regulation should address every possible contingency. He assured the Commission that there will never be a PAC comprised solely of funds of a lobbyist.

Mr. Tocher pointed out that the Proposition 208 regulation was enjoined by the court and was not in force at the time that the voters went to the polls. Additionally, the concepts of directing and controlling were expressed in § 85311. He did not believe that there was necessarily any indication that the voters did not intend to include "control" as a factor in determining who is making a contribution.

Mr. Tocher stated that staff believed that lobbyists should not be treated differently under § 85311. If they are directing and controlling the contribution it would be attributed to them for purposes of the contribution limits. He saw nothing to suggest otherwise.

Commissioner Swanson stated that Mr. Tocher's observations would seem to be in the spirit of the ballot argument.

Mr. Tocher agreed, and noted that the Supreme Court has ruled that the ballot arguments should be considered and that the motive or purposes of the drafters of a statute is not relevant to its construction, unless the voters were aware of that purpose and believed the language of the proposal would accomplish that purpose.

Commissioner Knox proposed that the ban apply to payments from a lobbyist's personal funds or assets and payments from any entity in which the lobbyist owns more than a 50% interest of that entity under regulation 18572. He did not believe that the "direct and control" language should be included. He preferred not to use the language that would apply the affiliated entities statute because of the concern over the difference between limits and bans. He believed that the language in § 85702 referring to the lobbyist "making the contribution" is broad enough to encompass both funds paid from the lobbyist's personal account and funds paid from any entity in which the lobbyist has more than a 50% ownership interest. He believed that the advice letter would not be a barrier because the statute uses the term "personal funds" which is different than the "making a contribution" provision of § 85702. That construction would be consistent with the clear intent of the voters to ban contributions by lobbyists and lobbying firms.

Commissioner Swanson stated that the proposal was not broad enough. She preferred including the "direct and control" language.

Commissioner Downey noted that Commissioner Knox's proposal addresses control of the entity, and that the courts have not supported that issue.

Commissioner Knox agreed that direction and control are difficult concepts, but noted that including the amount the person owns provides a clearer delineation. He stated that using ownership as the standard eliminates the issue of the person who serves as treasurer and signs the checks but does not have control over the money.

Mr. Tocher noted that the issue of PACs would not be addressed under the proposal.

Commissioner Knox stated that a lobbyist who is a member of a committee of lobbyists would have one vote among however many members there are in the committee.

Mr. Tocher noted that the committee may consist of only two lobbyists and that the committee may be primarily formed to elect a given official that both lobbyists are registered to lobby. The committee also could be a general purpose committee making contributions to candidates for the legislature.

Commissioner Knox responded that if a lobbyist has a greater than 50% voice in the committee's contribution decisions, then it would fall within the proposal.

Ms. Menchaca pointed out that the lobbyist would not own the committee.

Chairman Getman noted that the federal judge ruled that lobbyists can give to a PAC.

Mr. Hiltachk stated that the Commission, during the court proceedings, indicated that the lobbyist could give to a PAC as long as the PAC does not make contributions to candidates. Mr.

Hiltachk said he indicated to the judge that an extension of the ban to PACs or parties could result in another lawsuit.

Mr. Tocher pointed to a footnote in the ruling explaining its narrow reach. Contributions could be made to PACs so long as the contribution is designated not to be given to candidates that the lobbyist is registered to lobby. This would indicate that the judge did not see any constitutional concerns.

Mr. Hiltachk summarized that Commissioner Knox's proposal addressed entities in which a lobbyist owned more than a 50% interest ,without regard to whether the lobbyist directs or controls the entity.

Commissioner Swanson questioned why there needed to be such a high percentage of ownership.

Commissioner Knox responded that he was using the model of § 85311(d) for the proposal. He suggested that his proposal might be better if it included, "unless those entities act independently."

Commissioner Downey stated that he did not support that the additional language. He questioned the concept of what constitutes "making" a contribution.

Commissioner Swanson noted that the proposal seemed to be trying to cover every eventuality, and she questioned whether it would be legal to include broader terms. She suggested alternate language that would simply include affiliates instead of trying to include every entity.

Chairman Getman noted that Commissioner Swanson's suggestion could be accomplished by changing proposed regulation 18572(b) to read, "The provisions of § 85311, regarding affiliated entities, apply to the lobbyist contribution ban." She noted that § 85311 is a well-established body of law that works in every other contribution provision. She noted that there is nothing in the statute that disallows its inclusion.

Commissioner Swanson noted that the intent of the voters, as supported by the voter's pamphlet, requires that the Commission interpret the statute the way that the voters intended when they were voting.

Commissioner Downey believed that it would be too simple to presume that the voters thought that lobbyists and lobbying firms were the same thing. He pointed out that intelligent voters who read the pamphlet might know the state of the law and that there have been cases dealing with the constitutional issues involving lobbyists and lobbying firms. He agreed with Mr. Hiltachk that there was an intent to cut back the provisions of Proposition 208, and supported subdivisions (a) and (b)(1) of staff's proposal. He did not support subdivisions (b)(2) and (b)(3). He did not support subdivision (c)(3) because SB 34 changed the law by providing that § 85311 has direct application by its own language to contribution limits, and not to the bans on lobbyists described in § 85702.

Mr. Hiltachk pointed out that § 85311 provides aggregation rules for entities and individuals. If a lobbyist is banned from making a contribution, he questioned how that aggregation could be accomplished. Therefore, he believed that § 85311 did not apply.

Mr. Tocher stated that if the voters had decided that lobbyists could contribute $100, then two entities under § 85311 would only be able to contribute $50 apiece. Because the voters have said that lobbyists cannot make any contribution, he questioned how the Commission could now say that entities can now make $3,000 contributions per election.

Ms. Menchaca stated that it is important to look at § 85311 separately. She believed that if the Commission chose to interpret the statute so narrowly as to apply only to personal funds it would be applying the statute to individuals. Subdivisions (c) and (d) were not necessarily limited from that analysis when considering the entities. Commissioner Knox's proposal would fall under subdivision (d) and would work while still excluding (b) in order to narrow the application as it pertains to an individual under subdivision (a). She reminded the Commission that this emergency adoption would only last for 120 days and would allow the Commission to change it if it did not work well.

In response to a question, Mr. Tocher stated that the regulation would come back to the Commission, and that the only constraint when it comes back would be whether enough time had passed to provide a useful experience with the regulation. He did not know what the contribution experience would be during that time and could not determine whether contributions might be affected by the knowledge that these issues would be revisited before the election.

Chairman Getman noted that the Commission supported paragraph (a), and discussed the three proposals for paragraph (b). She explained that the concensus seemed to be that the ban should extend beyond the personal funds of a lobbyist. She suggested that the staff bring the options back as a regulation instead of an emergency regulation, providing statutory arguments for which of the three alternatives made the most sense under the statute. She stated that the regulation should address the voter's intent, not requiring that the contribution come from the lobbyist's personal funds.

Ms. Menchaca stated that a regular adoption would mean that the Commission would consider the regulation in May.

Chairman Getman responded that the Commission could continue to use advice letters for guidance until the regulation is adopted. She noted that the regulation would be brought back to the Commission for consideration only one more time.

The meeting adjourned for a break at 3:45 p.m.

The meeting reconvened at 4:05 p.m.

Item #8. Regulatory Calendar - March Work Plan Revisions

Ms. Menchaca explained that the regulatory calendar proposed some quarterly adjustments for consideration. She noted that there was a comment letter requesting that the Commission add consideration of an amendment to regulation 18116, pertaining to when statements are filed. Additionally, there was a request to add consideration of the *Siegel* issue to the conflicts calender, pertaining to when a non-profit becomes a government entity.

Ms. Menchaca explained that it would be difficult to accommodate the latter request without further modifying the calendar to delete one of the other projects. She was concerned that April's consideration of the conflicts of interest code/SEI project could also impact the calendar. She

did not question the merits of the requests, but was concerned that the additional workload could not be met.

Michael Martello, City Attorney of Mountain View representing the League of Cities, City Attorney's Group, proposed that staff conduct an IP meeting in July to discuss the *Siegel* issue on the same day that the IP meetings for conflict of interest calendar items 2 (General Plans) and 4 (Property "Subject of" a Decision) are held. If one of the other projects is postponed, then *Siegel* could be considered in its place. He believed that the issues involved in items 2 and 4 are very big and may require so much time that the Commission may choose to move them forward on the calendar. If *Siegel* is included on the calendar, the decisions could be ready before the filing period next year.

Ms. Menchaca stated that having an IP meeting would require that resources be spent because it is a complicated issue. She agreed to bring it to the Commission in June and let the Commission know at that time whether enough resources had been freed up to allow consideration of the *Siegel* issue.

There was no objection from the Commission to Ms. Menchaca's suggestion.

Ms. Menchaca stated that there was a specific proposal to amend the filing deadlines regulation, and explained that when staff prepares an update of Proposition 34 generally, in May, they can review the issue again. She could not promise that there would be any amendments at that time. She did not see any urgency to the issue.

Chairman Getman stated that there were many good points in the comment letter, but she was concerned about changing the filing deadlines between the primary and general elections. She did not believe it would be a good idea to tell people that late contribution reports no longer have to be filed on the weekends right before a statewide election.

Commissioner Knox noted that no one would be found in default if the deadline was moved back and questioned who would complain about the change.

Chairman Getman stated that those persons who look at the late contribution reports on the weekends would complain. The statewide campaigns require electronic filing and those filings are immediately accessible to the public.

Commissioner Swanson observed that it was difficult for some candidates to do their filings on the weekends, but was concerned about protecting the public. She asked whether the difficulties happened frequently and requested that staff research the issue.

Ms. Menchaca stated that it could be incorporated in the ongoing review of Proposition 34 in May, but that it would not be presented as a specific amendment to a regulation.

The Commission directed staff to prepare a report in May so that the Commission could decide at that time whether to have a further review.

Item #6. Proposition 34 Regulations: Pre-notice Discussion of Proposed Regulation 18531.7 and Amendments to Regulations 18215 and 18225.

Commission Counsel Natalie Bocanegra presented the proposed regulation pertaining to membership communications. She explained that this section provides an exception to the general rule that payments for communications supporting or opposing a candidate or ballot measure are reportable contributions or expenditures.

Ms. Bocanegra stated that the proposed regulation was developed as directed by the Commission, focusing on a regulatory definition of "organization" and "member."

Ms. Bocanegra presented two options in Decision 1, dealing with whether "organization" should be defined to exclude committees. The first option would include committees in the definition of "organization." Adoption of this option would mean that committees would not report payments for member communications as a contribution or expenditure. The second option would exclude committees from the definition of "organization" and would continue to require disclosure by committees under § 85312.

Ms. Bocanegra stated that if the Commission chose to include committees in the definition of "organization" and decided that recipient committees should report payments for member communications, then the additional language in proposed subdivision (d) could also be included, providing that even though committees are included in the scope of § 85312 they would still be required to report payments for member communications.

Ms. Bocanegra outlined statutory, regulatory and practical reasons for requiring reporting of those payment and discussed other instances in the Act that require disclosure of payments that are specifically excluded from the terms "contribution" and "expenditure." She noted that if the Commission decided that payments made by committees should be reported in a certain manner, it would be consistent with other determinations made by the Commission in the past. She noted that § 82015(b) excludes payments received by elected officials for certain legislative, governmental, or charitable events from the definition of "contribution," but payments of $5,000 or more are still required to be reported under that section. Payments made by a sponsoring organization for overhead and administrative services provided to its sponsoring committee are not contributions but must be reported by the committee. Section 85312 provides that payments made by political parties for member communications must be reported also.

Commissioner Downey noted that, if the Commission chose to include committees under the "organization" provision of § 85312, the Commission might still be able to require those committees to disclose the monies involved that are not expenditures under § 85312.

Ms. Bocanegra agreed, noting that if the Commission chose to do that, subdivision (d) of the proposed regulation would continue to require that recipient committees report those types of payments. Under the subdivision, the total costs associated with the communications that were made by recipient committees would be reportable in the same manner that overhead expenses are currently reported. She stated that staff offered no recommendation on the first decision, but pointed out that excluding committees from the definition of "organization" under § 85312 would probably preserve the maximum reporting required by longstanding rules of the Commission. .

Chairman Getman stated that she read the statute to require including committees.

Commissioners Knox and Downey agreed.

Chairman Getman stated that it was important that the committees report. She noted that a provision clarifying the issue of state versus local reporting was no longer included in the regulation. The Chairman discussed the Commission's 2001 opinion, ruling that the FPPC's reporting schedule had to be followed for all statewide committees. She understood that Los Angeles had revisited that issue and will be requiring additional membership communication reporting at the city level. She was concerned that their argument for doing so would be much stronger if the Commission did not include a reporting the provision.

Ms. Menchaca responded that the language was deleted because staff did not feel it was necessary since the regulation applies to any entity subject to the PRA. She said that the language could easily be returned to the regulation to ensure that it applies to local jurisdictions.

In response to a question, Ms. Menchaca stated that the reference to § 84211 is more of convenience. She suggested that the regulation could specify the requirements and refer to "payments" instead of "expenditures."

Commissioner Downey presented a hypothetical situation wherein a committee spent a few thousand dollars on member communications and was required to file a report. He questioned the Commission's authority to require the committee to disclose under § 85312.

Chairman Getman responded that it is the same authority the Commission uses to require committees to report payments made for newsletters, even though a newsletter payment is not an expenditure.

Ms. Bocanegra pointed out that § 84211(e) requires reporting of cash balances of committees.

Ms. Menchaca stated that the analysis should begin with § 84211 then go to the subsections when looking at the specific amounts.

Chairman Getman noted that it may seem to be a problem, but that expenditures and other payments are required to be reported, and that, in the contribution context, contributions and other increases to the cash balance must be reported. All the money coming in and going out must be reported, regardless of whether it is truly a contribution or an expenditure.

Commissioner Downey clarified that the real significance has to do with the limits for a committee.

Chairman Getman agreed, noting that if it is not a committee, it would involve both limits and reporting.

The Commission supported the approach including committees as an organization but requiring reporting of the payments made by a committee for a membership communication.

Ms. Bocanegra pointed out that conforming language in (a)(4) and conforming amendments to the newsletter exception provisions must be made since the Commission had decided to include committees, clarifying that the membership communication exception is broader than the newsletter exception.

Ms Bocanegra stated that Decision 2 language would provide that an organization has members only if it is not operated for profit, excluding from the exception a for-profit business entity that has members who are a large base of customers, eligible for certain discounts, and to whom communications are primarily advertising to the general public. Costco stores would be an example of those types of entities. Staff recommended inclusion of the bracketed language since usage of the term "members," should be given significance under the rules of statutory construction by providing that "member" pertains to persons having membership in non-profit organizations. This would narrow the exception provided in § 85312.

In response to a question, Ms. Bocanegra explained the Costco employees should not be considered "members" because § 85312 provides that the exception applies when payments are not made for general public advertising. Staff believed that communications to a large customer base characterized as "members" should be considered general public advertising. She suggested that business entities with customers who are called "members" should be distinguished.

Commissioner Downey noted that labor unions have members and can also be huge.

Ms. Bocanegra agreed, but noted that using "for profit" as a distinction would address that issue. Distinguishing between the use of the terms "members" "shareholders" and "employees would also help.

Commissioner Knox noted that the non-profit distinction is not found in the statute.

Ms. Bocanegra responded that it could be considered to be in the statute if the term "members" was used to distinguish nonprofits from an organization that has employees and one that has shareholders. She explained this distinction had been made in bankruptcy law. This analysis provides that the factors that distinguish employees, managers and customers from stockholders is not control, but the ability to make use of that control to generate profits or to increase their own share of profits. Staff was trying to address this issue in the same manner.

Commissioner Knox noted that a limited liability company's shareholders are referred to as members, and it clearly is a for-profit entity. He noted that sports clubs are for-profit and have members, and questioned whether they would be able to use the exception.

Chairman Getman asked whether those groups would have associational rights.

Ms. Bocanegra stated that there are a number of legal questions that address those associational rights with regard to corporations and their customers, but that additional research would be necessary to fully explore the question. She presented examples of preliminary research of court decisions pertaining to associational rights.

In response to a question, Ms. Menchaca stated that labor unions would be considered not for profit entities.

Chairman Getman noted that labor unions are considered 501(c)(5) groups. She noted that staff's definition of "members" required that some of the members have to be vested with the power and authority to operate and administer the organization. She believed that provision

resolves the issue because stores like Costco do not allow their customer "members" to have any control over the organization.

Ms. Bocanegra responded that the provision would not resolve cases where an entity allows participation by customers.

Commissioner Downey noted that co-ops allow members to have some control of the organization.

Chairman Getman noted that a tennis club might have members serving on the board and its members could have First Amendment associational rights.

Commissioner Knox questioned the harm if those organizations sent an endorsement to their members, who are customers but had paid a fee to be members.

Chairman Getman noted that a membership store may want to communicate to its members on a local ordinance that might affect the store, and she questioned whether the Commission had authority to exclude them from the exception.

Commissioner Downey agreed.

The Commission agreed to delete the bracketed language in decision 2.

In response to a question, Ms. Bocanegra stated that the limitation to 25 members or less served to provide a *de minimus* rule that would allow organizations with a small membership to be exempted from complying with all of the criteria in regulation 18531.7(a)(2). The proposed language was taken from FEC regulations.

In response to a question, Ms. Bocanegra stated that subdivision (a)(2) established a *de minimus* rule and criteria an organization must meet in order to qualify for the *de minimus* rule.

Ms. Menchaca stated that deleting the bracketed language in decision 2 would mean that subdivision (a)(2) would apply to for-profit entities and would not alter the criteria that accompanies “being a member.” If the Commission thought it was too narrow because it would not include the Costco type member, then staff would need to address it.

Ms. Bocanegra stated that decision 3 provides a criterion of membership by providing a specific monetary threshold of $2,000. This threshold amount was significant enough to trigger the Act’s disqualification rules. Staff recommended using this bright line criteria instead of the FEC rules which use a “significant financial attachment” criteria.

There was no objection from the Commission.

Chairman Getman suggested that the word “annual” in proposed regulation 18531.7(a)(3)(A) be changed to “regular” because many non profit entities encourage payment of membership fees on a monthly basis.

In response to a question, Ms. Bocanegra stated that a sports club consisting of more than 25 persons can communicate to its employees and shareholders, it would not be able to communicate with its members if it did not meet the criteria for having members. She noted that

the fundamental reason for including the criteria was to prevent sham organizations from using the Section 85312 exception.

Ms. Bocanegra stated that decision 4 involves whether a shareholder has to be an actual person ("individual") or a "person" as defined by the Act. She noted that the plain language of the statute seems to indicate that a shareholder would only be an individual, but noted that, for purposes of § 85312, a shareholder could include a family.

Commissioner Downey noted that there could be two kinds of shareholders, noting that some shareholders have families and some have corporations.

In response to a question, Ms. Bocanegra noted that the language of § 85312 provides an exception to the definition of "contribution" and "expenditure" and should be construed narrowly. Defining "shareholder" as an individual instead of a "person" would give a narrow construction and would be consistent with the language of the statute.

Commissioner Downey disagreed, believing "shareholder" to be an unambiguous term that could include partnerships, joint trusts, etc.

Commissioner Knox agreed.

Commissioner Downey pointed out that most shareholders who have an account with brokerage firms are not of record on the corporation's records, but are of record at the broker's office. He questioned whether the articles of incorporation would authorize the issuance of shares.

Chairman Getman suggested that staff further explore the definition of "shareholder" used by the SEC.

Senior Commission Counsel Laurence Woodlock suggested striking out the words "of record."

Commissioner Knox noted that the articles of incorporation include bylaws, minutes, and actions of the corporation authorizing the issuance of shares. He suggested that staff take a broader look at the issue.

Ms. Bocanegra stated that decision 5 could require that entities maintain detailed records to demonstrate compliance with § 85312. Staff had no recommendation, but noted that the records would be helpful in enforcing violations of the section. She noted that § 81002(f) requires that adequate enforcement mechanisms should be provided to public officials and private citizens in order to enforce the PRA.

Chairman Getman noted that this section provides that minimal political activity is allowed without subjecting the entities to the reporting requirements of the PRA. She noted that including the language of decision 5 would then require that those entities keep records to prove that they fall outside of the control of the PRA. She questioned whether the Commission should exert authority to that extent.

Ms. Bocanegra noted that if there were no records, there would be no way to know if there was a violation.

Commissioner Downey stated that someone who received the communication might file a complaint with Enforcement Division and that the business would have to be able to prove that there was no violation so it would be good business for them to have those records. He agreed with the Chairman's concern.

Chairman Getman pointed out that, if an entity made a communication that was not in violation of the Act, but did not keep records, they would then be in violation of the Act simply for not keeping the records. She did not believe that the Commission had the authority to reach that far.

The Commission did not approve including the bracketed language of decision 5.

Ms. Bocanegra stated that decision 6 would provide that costs for communications that are inadvertently sent to persons other than the intended recipients be included in the exception under § 85312 providing those costs do not exceed $100 or 5% of the total cost of the communication. Staff recommended that the language require that the criteron be the higher amount of the two thresholds because it would more readily accommodate organizations with many members.

There was no objection to requiring the higher threshold.

Ms. Bocanegra explained that decisions 7 and 8 involved subdivision (c) of the proposed regulation, and provided rules dealing with (1) a payment made at the behest of a candidate or committee, and (2) a payment that is made by another person to an organization and is earmarked for the support or opposition of a candidate or ballot measure. The issue addressed whether the § 82015 definition of "contribution" applied to those types of payments for member communications.

Commissioner Knox pointed out that if the candidate initiated the communication, it would taint the process. He supported the use of the words "is not" in decision 7.

Commissioner Downey questioned whether a member of a homeowner's organization that was in support of a ballot measure and paid for a member communication in support of that measure would not be required to report and would not be defined as an independent expenditure committee. He also questioned whether a local candidate in support of the measure could request that the organization send a flyer supporting a position on the measure and still fall within the exception.

Ms. Bocanegra stated that if the "behesting" was made by a representative of the ballot measure committee, and the Commission chose to apply the statutory definition of "contribution," then the costs of the mailing would be considered a contribution to the ballot measure committee.

Chairman Getman noted that the question was whether the Commission chooses to provide that "a payment for communications" is any payment made by or to an organization for communications from the organization to its members. Alternately, they could decide that only when a payment is made by the organization should it be considered a "payment for communications" under this section.

Ms. Menchaca believed that the words "to an organization" should be included when it involved a payment from a third party to an organization, noting that subdivisions (2) and (3) accomplish that.

Chairman Getman explained that the three questions involved were whether (1) the communication can be at the behest of a candidate or committee, (2) the candidate or committee can raise funds to pay for the communication, and (3) the communication must be made by the organization, or whether the candidate can make the communication directly to the organization's members. She believed that the communication would have to come from the organization to its members, but questioned whether it was as important to discern whether the payment for the communication came from the organization's own funds. She presented an example.

Commissoner Knox agreed. He noted that § 85312 was trying to protect a committee or candidate so that it could give flyers to the organization and ask them to mail them.

Chairman Getman stated that the City of Los Angeles would probably object to that rule because that situation existed in their last mayoral election and it created a means to get around the contribution limits.

Commissioner Downey noted that there are many such organizations and that the potential for getting around the contribution limits in this manner was a concern.

Commissioner Knox noted that the candidate must report the expenditures in connection with the flyers, and that only the mailing costs would not be reported. He believed that it encouraged "retail politics," and that it might be good.

Ms. Menchaca noted that the language could be tailored, but she was concerned that a person who had already made the maximum contributions allowed to a candidate might then contribute to an organization so that they could send out a communication in support of a candidate, thereby getting around a contribution limit. She noted that Mr. Tony Alperin, from the City of Los Angeles, had advised her that LA was only concerned about the definition of "earmarked" in the regulation. She suggested that earmarking definitions could be included to narrow it further, and the contribution limits would then apply. She noted that the lobbyist regulation included provisions dealing with using an intermediary.

Ms. Menchaca noted that a comment letter recommended that subdivision (c) be deleted from the proposal. She suggested that subdivision (c) be retained, and noted that the issues raised in the comment letter could be addressed and the proposal further tailored.

Ms. Bocanegra asked for the Commission's guidance regarding situations where a contributor wanted to make a $10,000 contribution to a candidate for the purpose of sending mailers. Under the contribution limits, the contributor would be prevented from making the contribution directly to the candidate. The Commission could allow that payment to be made through this regulation without subdivision (c) if the payment was made to an organization for a member communication.

Commissioner Knox stated that the language of the statute seemed to support the contribution, and suggested that if staff did not agree with that reading, they should present reasons why the language of the statute should not apply.

Commissioner Downey agreed, noting that the Commission did not want people to easily circumvent the contribution limits, and the hypothetical example could be a loophole that the Commission could not get around because of the plain language of the statute.

Chairman Getman stated that the statute could be read to mean payments "by" or "to" an organization.

Commissioner Knox agreed, and noted that if the Commission was going to limit the definition of “payments for communications” they would need a reason to do so.

Commissioner Swanson noted that they payment might include even a partial payment for a communication.

Chairman Getman stated that the extreme situation, whereby an organization could serve as a conduit for contributions far above the legal limits, needed to be addressed

Commissioner Downey suggested that tacit language indicating that the payments be made by the organization be included, if it was legal.

Mr. Krausse explained that the drafters of SB 34 indicated to him that an amendment to clarify that the exception be limited to payments from the organization and that the organization could not serve as a “pass through,” would not be taken. The drafters thought the Commission should accomplish that by regulation. He noted that he had not received any written documentation of that direction.

Ms. Bocanegra noted that decision 9 addressed contribution limits that would result from the interplay of §§ 85312 and 85303.

Chairman Getman suggested that this decision was so closely tied to decisions 7 and 8 that it should wait to be discussed until staff presented further discussions on those two decisions.

Ms. Bocanegra agreed.

Item #7. Pre-notice Discussion of Amendments to Lobbying Disclosure Regulations: 18239—Definition of Lobbyist; 18615—Accounting by Lobbyist Employers and Persons Spending $5,000 or More to Influence Leislative or Administrative Action; and 18616—Reporting by Lobbyist Employers and Persons Spending $5,000 or More to Influence Legislative or Administrative Action.

Ms. Wardlow presented the non-substantive amendments to the regulation, noting that the only decision was whether regulation 18616 should restate information in the statute for clarification purposes or leave it out.

Commissioner Downey stated that the statute was clear enough and that the information did not need to be repeated in the regulation.

Ms. Wardlow explained that the regulated community liked having it in the regulation because it is easier for them if it is all in one place. She recommended including the language in option 1. She noted that both options could be included when the amendments are brought back to the Commission with the noticed version.

There was no objection from the Commission to using the language of Option 1, which would include the language in the statute.

Item #4. Proposition 34 Regulations: Adopiton of Amendments to Regulation 18428, Reporting by Affiliated Entities (§ 85311).

Chairman Getman announced that this item will come back to the Commission in April or May 2002.

Items #30 and #31.

Chairman Getman announced that the following items would be taken under submission:

Item #30. Executive Director's Report.
Item #31. Litigation Report

Item #3 (continued):

Ms Menchaca presented the revised regulations, with the changes made to them pursuant to the Commission's discussion earlier in the day, for their review.

The meeting adjourned at 5:35 p.m.

Dated: April 12, 2002

Respectfully submitted,

_____
Sandra A. Johnson
Executive Secretary

Approved by:

_____
Chairman Getman